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## Document (1)

1. [HYNE v HYNE](#)

[BC202302660](#)

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**[HYNE v HYNE](#)**  
**[BC202302660](#)**

Unreported Judgments Federal Circuit Court of Australia (formerly Federal Magistrates Court of Australia) · 73 Paragraphs

Federal Circuit and Family Court of Australia — Division 1 First Instance

Schonell J

SYC 8218 of 2019

27 January, 6 February 2023

***Hyne & Hyne*** [2023] FEDCFAMC1F 36

## Headnotes

**FAMILY LAW** — Parenting — Interim Orders — Where the mother sought to discharge existing interim consent orders — Where the mother contends that there has been a change of circumstances — Where the father sought to dismiss the mother’s application — Where the parties have a highly conflictual relationship — Where the father has not seen the children since October 2022 despite orders being in place — Where a vast sweep of allegations have been made including allegations of family violence and sexual abuse — Where the allegations of risk raised by the evidence cannot be ignored — Where the Court is satisfied that there has been a change of circumstances — Orders made for the father to spend supervised time with the children.

(CTH) [Family Law Act 1975](#) Pt VII, ss 60B, 60CA, 60CC, 69ZL

*Adamson & Adamson* [\[2018\] FamCA 523](#) ; *Baisman & Cartmill* [\[2022\] FedCFamC1A 36](#) ; *Eaby & Speelman* (2015) FLC 93–654; [\[2015\] FamCAFC 104](#) ; *Goode & Goode* (2006) FLC 93–286; [2006] FamCA 1346 ; *Marvel & Marvel (No 2)* [\(2010\) 43 Fam LR 348](#); [\[2010\] FamCAFC 101](#) ; *Mazorski & Albright* [\(2007\) 37 Fam LR 518](#); [2007] FamCA 520 ; *Mulvany & Lane* (2009) FLC 93–404; [\[2009\] FamCAFC 76](#) ; *Sigley & Evor* (2011) 44 Fam LR 439; [\[2011\] FamCAFC 22](#) , cited

**Schonell J.**

[1] There are interim proceedings involving two children aged six and five years. The children’s parents have been in conflict about their living arrangements since shortly after the parties separated in 2019. The children currently live in the Suburb B area in Queensland with the applicant mother (“the mother”) whilst the respondent father (“the father”) lives in City D.

....

[2] The present application arises in circumstances where the children have not seen their father since October 2022 despite orders for them to spend time with him on five nights a month.

[3] The interim proceedings are part of wider proceedings between the parties involving financial matters. The parenting proceedings are highly conflictual and there is a vast sweep of allegations made by each of the parties against the other, including allegations of family violence, sexual abuse, drug use and assertions as to a psychiatric disorder.

[4] The mother's current application seeks a discharge of the interim consent orders made on 7 December 2021. She seeks sole parental responsibility, that the children live with her and spend either no time with their father or in the alternative supervised time at a contact centre at C Town in Queensland for a period not exceeding two hours once per week.

[5] The father's position was that the mother's application should be dismissed and that the children should spend time with him pursuant to the interim orders, which effectively provided for the children to spend a period of five nights on the first week of each calendar month.

[6] The Independent Children's Lawyer's ("the ICL's") position was that the children should have contact with their father by way of telephone and/or some other form of electronic communication, but otherwise that the children should not spend any face to face time with the father.

[7] The mother relied upon the following documents:

- (1) Application in a Proceeding filed 12 January 2023;
- (2) Affidavit of mother filed 12 January 2023; and
- (3) Family Report of Ms E dated 15 July 2021 ("the Family Report").

The mother also tendered various documents.

[8] The father relied upon the following documents:

- (1) Response filed 19 January 2023; and
- (2) Affidavit of father filed 19 January 2023.

[9] The ICL also relied upon the Family Report and tendered various documents in the proceedings.

## **BACKGROUND**

....

[10] The parties commenced living together in or about 2013, were married in early 2014 and separated on a final basis in August 2019.

[11] There are two children of the parties' relationship, X born 2016 and Y born 2017. X has been diagnosed with autism spectrum disorder and receives assistance from various therapists. Both children are in Year 1 at the same school in Suburb B Queensland.

[12] The parties currently live some hours apart.

[13] The children have always lived in the primary care of their mother.

[14] Following separation, the mother applied for an apprehended violence order.

[15] Following commencement of proceedings by the father on 3 December 2019, there were various interlocutory orders made by a judge of the then Federal Circuit Court of Australia providing for the father to spend supervised time with the children. One of the orders made was for the preparation of a family report.

[16] The Family Report identified numerous concerning allegations involving both parents. The following matters are taken from that report:

27. [Ms Hyne] alleges that [Mr Hyne] has been verbally, physically and financially abusive towards her during their marriage.

28. [Mr Hyne] alleges that [Ms Hyne] has been physically and verbally abusive towards him during their marriage.

...

32. [Ms Hyne] alleges that [Y] may be at risk of sexual harm from her father due to allegations that [Mr Hyne's] daughter from a previous marriage, [Ms F], made when she was 10 years. She further contends that [Mr Hyne] has owned a children's pornography site in the past and that this material has been investigated by police.

34. [Ms Hyne] alleges that [Mr Hyne] has been addicted to a prohibited substance in the past. She further alleges that the first of his three drug tests tested positive for [a prohibited substance].

35. [Mr Hyne] alleges that [Ms Hyne] has used [prohibited substances] extensively in the past. He further alleges that [Ms Hyne] is involved in importing drugs from overseas.

...

36. [Ms Hyne] alleges that [Mr Hyne] may suffer from [an] untreated [mental health condition].

....

37. [Mr Hyne] alleges that [Ms Hyne] is manipulative, erratic and a pathological liar.

...

45. [Ms Hyne] said that [Mr Hyne] also breached the supervision Orders in early 2020, and that he has also breached the AVO many times. She said that she applied to have the [early] 2019 AVO extended for another year in [late] 2019 after [Mr Hyne] tried to contact her by phone. [Ms Hyne] said that she is trying to get the AVO extended once more, as the current Order expired in [early] 2021, but that [Mr Hyne] and his lawyer have managed to adjourn the hearing [multiple] times.

46. [Ms Hyne] said that she was controlled and manipulated by [Mr Hyne] throughout the marriage and that she was mostly too scared or too “shut down” to make reports to the police. She said that [Mr Hyne] was also abusive towards the children, for instance he would spank [X] hard and lock him in his room for absconding, and he would be strict about a bedtime for [Y] even when she would vomit with distress. [Ms Hyne] said that [Mr Hyne] did not allow her to be a mother, employing nannies and baby-sitters instead so that she could work in their [...] businesses. She said that [Mr Hyne] once [injured Y’s] arm when he was trying to get her into the car and that he refused to go straightaway to the hospital to have the injury attended to. [Ms Hyne] acknowledged that, on that occasion, she reported to the [H Hospital] that [Mr Hyne] could sometimes be rough but that he did not present a threat to [Y] or to herself. She said that she regretted this decision, which was made out of fear and out of a desire to protect her husband.

...

48. [Ms Hyne] expressed concern that [Mr Hyne’s] daughter from a previous relationship, [Ms F], accused [Mr Hyne] of sexually molesting her when she was 10 years, and that she was protected by an AVO between 2012 and 2014. She said that [Ms F] re-initiated an AVO against her father in 2020. [Ms Hyne] also expressed concern that subpoenaed material from the Victorian Police identified that [Mr Hyne] owned a website called[...], which advertised photographs of [...] underage women. [Ms Hyne] said that [Y] may be at risk from her father in the future.

49. Subpoenaed material from Queensland Police appears to indicate that [Mr Hyne] was charged with possessing child exploitation material on his computer [in mid — 2007], having used his credit card to access this material.

50. In terms of mental health issues, [Ms Hyne] said that [Mr Hyne] has always behaved in a rash, abrupt and reckless manner. She said that his father had [a mental health condition and that his grandfather [...]]. [Ms Hyne] said that [Mr Hyne] pretended to her that he was dating [a celebrity] in 2020 and that, on other occasions, he sent her text messages expressing suicidal ideation. She said that, in mid-2020, [Mr Hyne] demonstrated mental instability when he wrote a letter to the ICL claiming that she was involved in the biggest drug cartel in Australia.

51. [Ms Hyne] said that she does not use drugs and that all three drug tests ordered by the ICL have returned clean results. She said that she consumes alcohol socially, and never around the children. [Ms Hyne] said that she does not know if [Mr Hyne] is currently using drugs, but she said that the first of his three drug tests returned a positive result for [a prohibited substance]. She said that [Mr Hyne] served a [...] jail term for drug-trafficking between 2008 and 2011.

52. Subpoenaed material from the Victorian Police appears to confirm the above and also, that [Mr Hyne] received a [...] suspended sentence for possessing [an illicit drug] and trafficking [a prohibited substance] in 2016.

...

....

59. [Mr Hyne] said that the current parenting arrangements have been subject to a great deal of change recently. He said that he had to forego fortnightly supervised contact over the Christmas period due to the fact that [Ms Hyne] was in Queensland with the children for [...] weeks. [Mr Hyne] said, however, that one month after her return in [early] 2021, [Ms Hyne] surprisingly proposed that the children spend increasing time with him, building up to fifty percent of the time over two months. [Mr Hyne] said that [Ms Hyne] admitted to him that she was struggling with the children and that she wanted to have an amicable arrangement where they could jointly decide about schooling and care for the children. He said that they remained amicable until the day of the Legal Aid mediation in [early] 2021, when she reversed her decision because he was unwilling to move back to Queensland.

60. [Mr Hyne] said that he relocated to Sydney in 2020 and re-established his business there so that he could be near to the children. He said that [Ms Hyne] mentioned relocating to Queensland to live with her new partner in [early] 2021, but he did not promise her that he would follow. [Mr Hyne] said that he narrowly avoided becoming bankrupt in the process of moving to Sydney and that he is now back on track financially. He said that [Ms Hyne] alleged at the mediation that he was planning to move to [Country G] in [late] 2021, but he said that this had only been a hypothetical discussion, based on the fact that [X] might be able to enrol at an international facility called [L School].

61. [Mr Hyne] said that he has now resumed supervised time, for which he pays \$[...] per contact visit. He said that the feedback from [P Family Services] has always been extremely positive. [Mr Hyne] said, however, that [P Family Services] made a report to the DCJ in 2020 after [Y] apparently vomited on her bed and under her bed after being hit by [Ms Hyne] in the face. He said that [Ms Hyne] would never deliberately set out to hit the children, but that her parenting is sometimes erratic.

62. With regard to the incident when [Y's] elbow was pulled in [Suburb J] in 2019, [Mr Hyne] said that he was trying to prevent [Y] from running off towards an unfenced creek whilst at the same time trying to stop [X] from running off towards a busy road in the opposite direction. He said he grabbed [Y] by the arm and pulled her to his chest and he grabbed [X] by the shirt. [Mr Hyne] said that, in hindsight, he should have buckled [Y] into her car seat before unbuckling [X] from the stroller. He expressed disappointment that this incident has subsequently been described by [Ms Hyne] as child abuse.

63. Subpoenaed material from the [H Hospital] indicates that a report was made to the Department of Child Safety [in mid — 2019] based on the General Practitioner's concerns about a possible non-accidental injury. In a follow-up email [in mid — 2019], the hospital noted [Ms Hyne's] acknowledgment that [Mr Hyne] could be rough with the children but that she did not have any concerns about physical injuries or risk of harm to herself or them. Records indicate that [Ms Hyne] was agreeable to further discussions with the Social Work department.

64. With regard to family violence issues, [Mr Hyne] said that he was scared of [Ms Hyne] for most of the time during their marriage. He said that she bashed him seven days after the wedding and that she became violent and made false allegations when she was on drugs. [Mr Hyne] said that he put a lock on the bedroom door so that he could escape her violence and that the A VO in 2014, where [Ms Hyne's] nose became injured, occurred when he was trying to push her away from him.

...

66. [Mr Hyne] said that [Ms Hyne] was addicted to [prohibited substances] during their marriage, and that she spent long periods of time away in [Country K] and in Sydney where she would stay with the man with whom she was having an affair, who was also her drug partner. [Mr Hyne] said that he could produce evidence of these trips if necessary. He also said that [Ms Hyne] was implicated in recent federal police operations. [Mr Hyne] said that [Ms Hyne's] second and third drug tests have been clean, however, she did not ever submit the results of her first test. He said that he is not aware of [Ms Hyne's] drug or alcohol use, but he expressed concern that her partner is an alcoholic.

....

67. With regard to his own drug and alcohol use, [Mr Hyne] said that he no longer takes drugs and that he drinks socially on average two nights per week. He acknowledged that his first drug test produced a positive result for [a prohibited substance] but he said that this was after a New Year's Eve party, and that the subsequent two drug tests have been clean.

...

69. [Mr Hyne] described [Ms Hyne] as deceitful, cunning, erratic and manipulative. He said that she lies in order to get her own way and that she is a "con-artist". [Mr Hyne] said that [Ms Hyne]'s recent trip to Queensland in [mid — 2021] where she left the children in the care of a baby-sitter for two weeks, demonstrates her erratic and inconsistent approach to parenting. He said that, after consulting with his lawyer, he tried to pick up the children from [W School] in the preceding week because he did not believe that it was in the children's best interests to be cared for by a baby-sitter for that length of time. [Mr Hyne] said that he was not allowed to take the children, even though he is well-known to the centre who have previously given him card access.

...

71. [Mr Hyne] denied that he ever sexually abused his daughter [Ms F] as a child. He said that she did make an allegation of sexual abuse when she was young but that she repeated a story which she had been told about her great-aunt's sexual abuse. [Mr Hyne] said that [Ms F] was manipulated by her mother [Ms M] at the time and that she has since apologised. He also denied the allegation that [Ms F] has taken out a new A VO against him in 2020. [Mr Hyne] said that he has a close relationship with both [Ms F] and his son [Mr N] and that a family gathering is being planned for [mid — 2021].

**[17]** The Family Report writer observed an interaction between the children and each of their parents. In relation to the mother, she records as follows:

96. Overall, [Ms Hyne] appeared to have a warm and loving relationship with the children. She was adept at managing [X's] frustrations and distracting him into more constructive activities, whilst also giving [Y] positive attention. [Ms Hyne] offered the children many suggestions to initiate and extend their play whilst also allowing them to take the lead.

**[18]** In relation to the father, she records as follows:

97. [Y] greeted her father affectionately in the waiting area. [Mr Hyne] asked about [X's] whereabouts and he suggested that [X's] mood would improve once back in the observation room. [X] was indeed amenable to returning to the observation room to find [Y] and he was encouraged by the Family Consultant to take his cars with him.

....

98. [X] beamed at his father straightaway from the door and he responded happily to his suggestion that they play Go Fishing together. [X] became very giggly when he successfully managed to retrieve the blue fish from the moving tray. He waved his arms up and down gleefully. [Mr Hyne] reminded [Y] of a time when [X] couldn't stop laughing when playing hide and seek so he was easy to find. When all of the fish had been retrieved, [Mr Hyne] turned off the switch on the tray, saying the battery must have died, perhaps in order to divert the children's attention onto a calmer activity. [Y] fetched the Go fishing box when asked, and both children helped put the fish back in their holes.

99. [Y] gravitated to the cub by house, whilst [Mr Hyne] picked up [X] to give him a long cuddle. He encouraged [X] to name the plastic animals in a nearby box and to find the snake and the "horsy". [X] then started pushing his car around the floor whilst making loud noises. [Mr Hyne] commented affectionately to [Y] that [X] "has lost the plot today". He suggested to [X] and [Y] that they do cut outs at the play dough table. Both children followed [Mr Hyne's] instructions in bringing back the play dough from the cubby house. [Mr Hyne] encouraged [Y] to push the tiger cut out shape into the play dough. He said, "Push, push", and "Show me your muscles".

100. [Y] climbed onto her father at one point, whereupon [Mr Hyne] suggested she might like a tickle. She lay on the floor with her arms above her head as instructed, squealing with delight when [Mr Hyne] reached down to tickle her. He did the same with [X] who also giggled hysterically.

101. [Mr Hyne] suggested to [Y] that they make a tower from the small Lego bricks. [X] began diving to the floor, perhaps in imitation of his father tickling him. When encouraged by [Mr Hyne] to do so, [X] helped bring over small bricks to be added to the tower.

102. When it was time to finish, both children helped tidy away the Lego bricks and the play dough.

103. Overall, [Mr Hyne] appeared to have a warm and loving relationship with each of the children. He was fun, he divided his time equally between the children and set boundaries for good behaviour. [Mr Hyne] was also adept at diverting [X] to quieter activities when he became too boisterous.

[19] The Family Report writer evaluated the parties in the following terms:

104. This is a complex matter where there are multiple allegations of family violence, child abuse, drug abuse and mental health issues on both sides. Some of the concerns raised relate to [Mr Hyne's] children from a previous relationship. In addition to issues around how the children should spend time with each parent, there is also the issue of whether the mother should be permitted to return to Queensland, having only moved from there to Sydney in 2019.

...

107. Both parents demonstrated competency and sensitivity around the children. They divided their time equally between the children, and they managed [X's] occasionally boisterous behaviour by redirecting him towards more constructive activities. Both parents were able to engage the children in a tum-taking game, and they were both able to set boundaries for good behaviour. These observations of parenting capacity are mirrored by the external agencies involved. [Ms O] from [P Family Services] reported [Mr Hyne] to be caring and attentive of the children, whilst [Ms Q] reported [Ms Hyne] to be a resourceful and organised parent, with good attachment to [X].



....

...

109. Subpoenaed material from the [H Hospital] in [mid — 2019] confirms that questions were raised by the General Practitioner and the hospital about a possible non-accidental injury, however, [Ms Hyne] was reported to have said at the time that she did not have concerns for hers or the children's safety. [Ms Hyne] said that she regrets that decision which was based on a confused loyalty towards [Mr Hyne]. It may that [Mr Hyne] acted roughly towards [Y] on that day, but a pulled elbow is a fairly common injury in children and [Mr Hyne] gave a plausible account of why he had felt it necessary to grab [Y] for her own safety.

...

111. [Ms Hyne] also raised concerns about possible future risk of sexual harm from [Mr Hyne], given allegations made by his daughter, "[Ms F]" from a previous relationship. Whilst [Mr Hyne] acknowledged that allegations were made by [Ms F] when she was 10 years, he contended that [Ms F] fabricated this story based on what she had heard about the sexual abuse of someone else in the extended family. [Ms Hyne] also alleges that [Ms F] reactivated an A VO against her father in 2020, but this is denied by [Mr Hyne]. Without access to DCJ material in Victoria, or access to the previous [Hyne/Kinnear] matter, or access to [Ms F] herself, it is difficult to assess these allegations and it may be that further investigation is required by the Court.

112. [Ms Hyne] also alleged that [Mr Hyne] was charged by Victorian police with operating a website advertising [...] in the past. Whilst not specifically related to a website, there does appear to be some evidence from Queensland Police that [Mr Hyne] accessed child exploitation material [in mid — 2007].

113. With regard to other risk factors, both parents contend that the other has mental health issues. Whilst there seems to be no independent evidence of mental health concerns for [Ms Hyne], [Mr Hyne] said that he obtained a psychological assessment in [late] 2020 from psychologist, [Mr R], to satisfy [Ms Hyne's] concerns about his mental stability. He said that [Mr R] assessed him to be of sound mental health. [Mr Hyne] acknowledged that the assessment was instigated by an email which he sent to the ICL alleging that [Ms Hyne] was involved in the biggest drug cartel in Australia. [Mr Hyne] still appears to hold such concerns, based on recent drug operations by the federal police. He said that he could produce evidence of this if necessary, and evidence of flights made to [Country K] during the marriage. Without such evidence, it is difficult to imagine [Ms Hyne] operating in any such operations given her present circumstances and life style, but the Family Consultant is not an expert in such matters. If anything, the evidence appears to be the other way, with [Mr Hyne] having been gaoled for drug trafficking for [...] years in 2008, and with him having received a suspended sentence for trafficking [a prohibited substance] in 2016.

114. Although both parents allege that the other has been addicted to drugs in the past, there does not appear to be any evidence of recent drug use, although [Mr Hyne] acknowledged that he tested positive for [a prohibited substance] in early 2020, having been to a New Year's Eve party.

115. With regard to family violence issues, [Ms Hyne] alleges that she was subject to verbal, physical and financial abuse from [Mr Hyne], whilst [Mr Hyne] alleges that he lived in fear of [Ms Hyne's] violence whilst under the influence of drugs. There is an AVO against [Mr Hyne] in 2014 following an injury to [Ms Hyne's] nose which [Mr Hyne] contends occurred when he was trying to shut her out of the bedroom. There is also an AVO against [Mr Hyne] in [early] 2019 which was extended by one year in [early] 2020, and which [Ms Hyne] seeks to extend further. [Mr Hyne] asserts that breaches of the 2019 Order occurred in response to receiving multiple calls from [Ms Hyne]. [Ms Hyne] did acknowledge that she has made some calls to [Mr Hyne] and that [Mr Hyne] still has her mobile number.

116. Whilst [Ms Hyne] may have felt controlled and manipulated by [Mr Hyne] during the marriage, it is not clear why she instigated contact with him in [early] 2021, offering to work cooperatively together with him towards a shared care arrangement outside of the current Orders. It may be that [Ms Hyne] was struggling in Sydney without any family support, or it may be that she wanted [Mr Hyne's] agreement to return to

....

Queensland. [Mr Hyne] contends that [Ms Hyne] resumed supervised time at a Legal Aid mediation at the end of [early] 2021 when he refused to consider relocation back to Queensland. Given the concerns raised by [Ms Hyne] regarding [Y's] possible risk of sexual harm from her father, which were outlined in subpoenaed material produced in March 2020, it is concerning that [Ms Hyne] appears to have temporarily set those aside in favour of an "amicable" co-parenting relationship.

117. It is also not clear why [Ms Hyne] left the children in the care of carers for two weeks whilst she went on holiday to Queensland in [mid-] 2021. [Ms Q] from [...] [Suburb S] appeared to think that the trip was caused by a family emergency, but this was not what [Ms Hyne] said in her interview. [Ms Q] said that the children struggled initially without their mother, and that the carer initially struggled with [X]. Whilst [Mr Hyne] is right to be concerned that the children were left in the care of a relative stranger for such a long period, his attempt to remove them without warning from their preschool is also concerning. Young children, especially those with vulnerabilities such as ASD need predictability and routine in order to feel safe.

118. Overall, [Y] and [X] appear to have experienced a considerable lack of consistency in their routine and education in the first six months of 2021. They spent nine or ten weeks in Queensland in [late] 2020 and [early] 2021. The children spent considerably more time with their father in [early] 2021 than they were accustomed to; from three hours per fortnight to consecutive overnight time. According to [Ms Q], they also spent another three weeks on holiday in Queensland in [early] 2021. And since that time, they have had to cope with two weeks away from their mother, and a return to supervised visits with their father, which according to [Ms O] are often cancelled at the last minute.

...

121. In terms of future parenting arrangements, the parents could not be further apart in their current proposals. [Ms Hyne] is seeking an Order for no time, whilst [Mr Hyne] is seeking Orders for an equal time arrangement.

122. The children appear to enjoy spending time with their father, a fact which is also acknowledged by [Ms Hyne], therefore, unless it can be proven that [Mr Hyne] presents a danger to [Y] and [X], the children should continue to spend time with him. Supervision has now been in place for more than one year and no care concerns have been noted in that time. If [Mr Hyne] can produce evidence that he presents no risk of sexual harm to [Y], that he continues to be drug free, and that no concerns have been noted from his mental health assessment in [late] 2020, consideration could be given to relaxing the need for supervision, and extending time gradually to include overnight time.

**[20]** The Family Report writer made the following recommendations:

128. It is recommended that [Ms Hyne] hold sole parental responsibility.

129. It is recommended that consideration be given to [Ms Hyne] and the children relocating back to Queensland.

130. If [Mr Hyne] can demonstrate to the Court that he is not a risk to the children, it is recommended that supervision be rescinded and that time build up to a fortnightly or monthly weekend arrangement, depending on where the children are located.

131. If, after further investigation, [Mr Hyne] is not considered to be a safe parent, then his time with the children should either continue to be supervised, restricted to daytime only, or ceased altogether.

....

**[21]** Notwithstanding the content of the Family Report, on 7 December 2021, the parties entered into interim consent orders that provided for the mother to relocate with the children to Queensland and for the children to spend increasing periods of time with the father such that by March 2022 they would be spending five nights on the first week of each month with their father on an unsupervised basis. In light of the allegations raised and as yet unresolved, it seemed an extraordinary about face.

**[22]** The mother in her affidavit says the following:

7.2. On or around 7 December 2021, the Respondent and I agreed to the December Orders, which saw the children spend five nights a month with [Mr *Hyne*], unsupervised.

7.3. Although I agreed to the consent orders, I did so without understanding the gravity of the Respondent's previous police convictions and interactions as I had not yet been able to view the subpoena material.

7.4. Since the December Orders were made and once the AVO ended in or around [mid — 2022], the Respondent has made multiple breaches, by taking the children out of school and not returning them for extended periods of time (explained further below).

**[23]** At a final hearing, one imagines that what the mother records at paragraph 7.3 will be the subject of some detailed cross-examination.

**[24]** Whatever might have been the good relations between the parties that led to the December 2021 orders, things quickly deteriorated from about mid — 2022. The mother contends that the children went into the father's care on a date in mid — 2022 and were due to be returned to her a short time later, in 2022. She says that the children were not returned to her until several days after that.

**[25]** In mid — 2022, the father contends that he received a verbal threat from a person he describes as the mother's partner. The father records the following in his affidavit:

5.42 The conversation was only roughly 45 seconds long and included aggressive and incendiary phrases like, 'I'm going to kill you and your pathetic children. You weak piece of shit'. He then repeated he was going to kill me and then at the end of the conversation, again added he would kill my children.

5.43 Irrefutably taken back from these comments I asked who was speaking and he said, 'You will soon find out'.

5.44 I then told him 'Why wait just send me your address and I will come to you'. He started to stumble on his words and subsequently repeated the death threats, at which point, I swiftly hung up the phone.

5.45 I could hear the mother in the background encouraging him. The mother was very aware as to what had taken place.

....

**[26]** The father said that he feared for both his safety and that of the children and therefore withheld the children from their mother. In his affidavit, the father says:

5.57 In the recordings and in conversation with the kids the kids witnessing extreme violence in front of them between the mother and her partner, to the kids being chased by her partner to a point to where the kids had to lock themselves in the car because they were scared or the kids having to watch their iPad be broken in front of them after the mother's partner threw them on the ground.

**[27]** The children were not returned to their mother for approximately 34 days. Since the children's return to their mother in late 2022, they have not spent any time with their father.

**[28]** It is immediately apparent from the above that neither party has complied with the terms of the interim consent orders.

**[29]** The mother says that since the children were returned to her care, the children have made concerning statements to her about the time they spent with their father. In that respect, she says the following in her affidavit:

7.76. ...

7.76.1 . They were forced to go with the Respondent to his employment at the [...], repeatedly being woken up at 3am and then spending the morning/day locked in the car, unattended, with an iPad, blankets and pillows, until the [...] closed, and the Respondent had finished pack down.

7.76.2 . If the children were not forced to spend their days at the [...], they were babysat by the Respondent's mother, a lady known only as '[Ms T]' or the Respondent's girlfriend '[Ms U]'. Often, the children would not see the Respondent for a few days while he was working away at [...] and while they were being cared for by these 'babysitters'.

7.76.3 . The Respondent would often, on a daily basis, discipline the children by hitting their head, arm, back or bottom and/or locking them in their bedroom for a period of time.

7.76.4 . The Respondent locking the children in their bedroom of a nighttime so they could not leave the room, even to use the bathroom, until the Respondent unlocked the bedroom in the morning.

7.76.5 . The Respondent 'licks' [Y] every night on her face, ear and neck, despite [Y] saying it is disgusting and she does not like it;

7.76.6 . They don't want to go to school as they are scared the Respondent will take them away again and not let them see me; and

....

7.76.7 . The Respondent and his girlfriend '[Ms U]' are often yelling and fighting and breaking doors and throwing items around the apartment frequently and in front of the children.

7.77. On or around [late] 2022, [Y] spoke with me about her time with the Respondent and said words to the effect that Daddy licks my face at night and often licks me in the mouth.

...

7.81. I am aware that the police and the DCYJMA have opened an investigation against the Respondent. On or around [late] 2022, the police and DCYJMA advised me to take steps to cease any and all time that the Respondent is to spend with the children pending an investigation or further order.

7.82. [In late] 2022, [Y] told me words to the effect that "*I don't know how to tell someone, but daddy touches down there as well*". [Y] stated this while pointing to her vagina.

[30] The mother says that Y's allegations are still being investigated by the Queensland police and the Queensland Department of Children, Youth Justice and Multicultural Affairs ("the DCYJMA").

[31] The father denies most of the mother's allegations and in particular the allegation that he has touched his daughter inappropriately. He further says that he has not been contacted by the Queensland police or the DCYJMA.

### APPLICABLE LAW

[32] Consistent with the provisions of s 69ZL of the Family Law Act 1975 (Cth) ("the Act"), I set out in short form my reasons.

[33] This is an interim hearing and there has been no cross-examination. By virtue of that fact, I am unable to make findings in relation to the disputed facts about which there are many. However, just because I am unable to determine or resolve the disputed facts and assertions does not mean that I ignore the allegations of potential risk.

[34] In *Marvel & Marvel (No 2)* ([2010](#)) [43 Fam LR 348](#) (which has been cited with approval by the Full Court in *Eaby & Speelman* (2015) FLC 93-654 ), the Court observed:

122. In *SS & AH* ([2010](#)) [FamCAFC 13](#) the majority (Boland and Thackray JJ) discussed at [88] of their reasons the care necessary to be exercised in making findings in interim parenting proceedings. Their Honours said:

[88] In our view, findings made at an interim hearing should be couched with great circumspection, no matter how firmly a judge's intuition may suggest that the finding will be borne out after a full testing of the evidence.

....

123. Later, at [100] their Honours amplified their comments and said:

[100] The intuition involved in decision-making concerning children is arguably of even greater importance when a judge is obliged to make interim decisions following a hearing at which time constraints prevent the evidence being tested. Apart from relying upon the uncontroversial or agreed facts, a judge will sometimes have little alternative than to weigh the probabilities of competing claims and the likely impact on children in the event that a controversial assertion is acted upon or rejected. It is not always feasible when dealing with the immediate welfare of children simply to ignore an assertion because its accuracy has been put in issue.

[35] In *Adamson & Adamson* [\[2018\] FamCA 523](#), McClelland J (as he then was) observed:

50. It is to be observed that that reference in *SS v AH* to “probabilities” does not mean that the Court must find the probable existence of an unacceptable risk of harm before implementing measures to protect a child from that risk. It is clear that in assessing whether there is a risk that something may happen, “possibilities” are a legitimate basis for finding that there is such a risk, as long as there is a proper basis for those “possibilities”.

[36] Parenting proceedings are governed by Pt VII of the Act.

[37] Section 60CA of the Act provides that the Court is to regard the best interests of the child as the paramount consideration. Section 60B of the Act outlines the objects and principles underlying Pt VII.

[38] In determining what is in a child's best interests, the Court must consider the matters set out in s 60CC of the Act. Section 60CC outlines the primary and additional considerations that the Court is to take into account in determining what is in the best interests of a child.

[39] The Full Court in *Goode & Goode* (2006) FLC 93–286 (*Goode*) set out the procedural steps in an interim application, noting that in interim proceedings there may be little uncontested evidence. Consistent with the guidelines outlined in *Goode* and to the extent relevant and necessary, I have in these reasons identified the competing proposals of the parties, the issues in dispute, and the contested facts.

[40] In circumstances where the parties entered into interim consent orders on 7 December 2021, a consideration for the Court is whether or not there has been a change in circumstances sufficient to warrant a court reinvestigating the matter. This is even more so where the father contends that many of the matters that the mother relies upon in relation to allegations of past behaviour by the father were known to the mother prior to the entering into of the orders on 7 December 2021. In that respect, there is reference in the Family Report to previous

....

allegations of family violence, drug use, allegations of inappropriate touching of a child of a prior relationship and allegations that the father had access to child exploitation material.

[41] In *Baisman & Cartmill* [2022] FedCFamC1A 36, Tree J observed as follows:

11. The so-called rule in *Rice and Asplund* (1979) FLC 90–725 (*Rice & Asplund*) is based on the notion that it will only be in a child's best interests to expose them to further litigation if there has been a significant change in circumstances since the previous parenting orders were made. The rule has now been considered by a number of Full Courts, although it may fairly be said that the application and operation of the rule remains somewhat opaque. An analysis of those cases, demonstrates that the following relevant principles may either be drawn directly from them, or otherwise logically arise:

- (a) The rule is but one manifestation of the best interests principle;
- (b) However best interests are not the only consideration relevant to the application of the rule, with other considerations including public policy issues such as the finality of litigation, and practical matters, such as the stage of the litigation at which the rule is being considered and the nature of issues involved in the several pieces of litigation;
- (c) The rule requires there to be a sufficient change of circumstances to justify the re-litigation;
- (d) The rule can be applied at any stage of the proceedings;
- (e) The effect of the operation of the rule will vary depending upon the time of its application, or more precisely the stage of the litigation when the rule is being applied;
- (f) If the rule is considered prior to trial, it may be invoked by way of an application for summary dismissal (in which case the court is likely to proceed on the basis of taking the applicant's case at its highest and not permitting cross-examination) or alternatively may be dealt with by way of preliminary issue (in which case cross-examination may be permitted and findings of fact made);
- (g) If the rule is raised and considered at trial, most of the evils which the rule is intended to overcome or ameliorate will have already ensued. In considering whether it may be appropriate for the application of the rule to be determined as a preliminary point at trial, factors which may influence that decision will include the dislocation of the trial process if there is a reserved judgment, and the additional delay involved. Converse considerations may be the cost to the parties of any trial if indeed the rule's application at the end of the trial sees re-litigation impermissible;
- (h) The rule may also be dealt with at trial by way of something akin to a no case submission, but similar considerations to the determination of the matter as a preliminary issue at trial would again arise;
- (i) Logically, the extent of revisitation of prior orders sought by an applicant will be relevant in determining the likely impact of any re-litigation on the child. Arguably, if only a small variation of prior orders is sought, the impact on the child is likely to be less;
- (j) Likewise, the court may only permit re-litigation on one or some of the issues sought to be re-agitated by the applicant, if doing so is in the child's best interests, or conversely, a wider scope of re-litigation is not in the child's best interests;
- (k) Logically, it must be relevant whether or not the prior orders were made by consent, or at the end of a trial, or consequent upon an undefended hearing, and in any case, also relevant will be the circumstances by which

....

- the orders came to be made (eg if they were made at an early stage of the proceedings or after lengthy litigation);
- (l) The parties will be bound by any findings of fact actually or implicitly made in prior orders, at least to the extent that they were necessarily made to quell the controversy;
  - (m) It will be a matter for the trial judge as to whether under s 69ZQ of the Family Law Act 1975 (Cth) (“the Act”), evidence should be restricted only to matters post-dating the last orders, or alternatively, if leave to re-litigate is given, it might be conditional upon a limitation of issues or temporal scope of evidence;
  - (n) Irrespective of the stage the litigation is at when the rule is considered, the determination remains merits based and is not a technical one.

**[42]** The mother contended that there was a change of circumstances, pointing to the allegations made in late 2022 of inappropriate touching as well as the conflict in the father’s home which was observed by the children.

**[43]** Her counsel submitted the recent allegation by Y comes against a background of there being previous allegations involving a child, as well as allegations that the father has accessed child exploitive material. Y also reported to her mother that the father licks her on her face. The father denies all allegations of accessing child exploitive material or touching Y inappropriately. The father does not dispute that he licks Y on her face and contends that it is merely a form of affection between him and his daughter that is completely innocent.

**[44]** The mother’s counsel also submitted that there is conflict in the father’s household, the true extent of which remains unclear. In that respect, the children report to their mother that there is often yelling and fighting involving the father and his partner.

**[45]** Curiously, annexed to the father’s affidavit is a statement prepared by his partner. She records as follows:

Furthermore, the claim that [Mr Hyne] would lick [Y] is baseless and frankly abhorrent. [Mr Hyne] never did such a thing, and I was always there with the three of them. We would spend all of our time happily together and it was truly happy household. Both [X], and particularly [Y] would incessantly run over to [Mr Hyne] and tell him how much they loved him and that he was, “the best daddy in the world”.

(Affidavit of father filed 19 January 2023, Annexure C)

**[46]** It is curious that the partner is so emphatic in her view, notwithstanding that it is not in issue that the father has licked Y on the face. The father’s partner also contends in her statement the following:

Our lives are peaceful, irrespective of the stress and lunacy incited by these absurd claims, and all we both want is a safe, consistent and happy household where [X] and [Y] can thrive and grow into beautiful young people. [Mr Hyne] and I have an irrefutable amicable, loving, caring and fruitful relationship, one of which we rarely fight and we relish in providing a sense of what a loving and respectful dynamic can be like within a household for the children. ...



....

(Affidavit of father filed 19 January 2023, Annexure C)

[47] Documents from Queensland Police, being Exhibit 7 in the proceedings, record an incident in late 2022, being a time when the children were in the father's care, of the father calling the police in circumstances where his partner had consumed too much alcohol. He describes to the police his partner having a problem with alcohol abuse. The documents record:

... [...] woke this morning very angry and began accusing the agg of having an affair. Was yelling and screaming — nil violence. Agg wanted to get the kids out of the apartment because they were getting upset due to the yelling. Agg left the apartment for the remainder of the afternoon. ...

(As per the original)

[48] The happy picture presented by the father's partner is inconsistent with what the children tell their mother and what the father reported to the police.

[49] I am satisfied in accordance with the mother's counsel's submissions that there has been a change of circumstances sufficient to warrant a reconsideration of the consent orders made 7 December 2021. I am satisfied that those orders are no longer in the children's best interests, particularly in circumstances where the parties themselves have each chosen not to comply with the orders. On two occasions, the father has in defiance of court orders held the children in his care for longer than was provided by the terms of the consent orders. In particular, holding the children in his care for 34 days, particularly in circumstances where the children had not seen or contacted their mother for a long period of time and where one of the children has autism spectrum disorder, is very troubling no matter the asserted attenuating circumstances. Likewise, the mother has herself chosen to no longer abide by the orders. The allegations raised by Y are concerning particularly in combination with the historical allegations.

[50] I will now turn to consider what orders should be made.

#### **PRIMARY AND ADDITIONAL CONSIDERATIONS**

[51] In applying the primary considerations, the benefit to the child of having a meaningful relationship with both parents is subservient to the need to protect the child from the risks and harms identified in the subsection.

[52] A meaningful relationship "is one which is important, significant and valuable to the child" (*Mazorski & Albright (2007) 37 Fam LR 518* at [26], cited with approval by the Full Court in *Sigley & Evor (2011) 44 Fam LR 439*).

[53] As stated above, I am required when applying the primary considerations to give greater weight to the need to protect the children from risk and harm than to the benefit to the children of having a meaningful relationship with both parents.

....

[54] I cannot ignore the allegations of risk that are raised by the evidence. I cannot resolve the competing factual disputes arising out of the various incidents that these children have been exposed to in the period subsequent to separation as well as the allegations raised by the mother of the father's alleged access historically to child exploitive material.

[55] Whilst the allegations in relation to such access relate to periods in 2006 and 2007, the mother also makes reference to the father operating a "soft children's pornographic website" (mother's affidavit, paragraph 7.74). I am not of the view that the age of the allegations diminishes the risk. Whilst Y's allegations have not yet been investigated, in light of the very serious historical allegations raised in the material and in circumstances where I am unable to resolve the competing factual disputes, I need to act cautiously. I am satisfied that there exists a possibility of a risk of harm if the orders as sought by the father are made. The authorities make clear that possibilities are a legitimate basis for a finding of risk.

[56] I cannot know what the outcome of the orders as proposed by the father might be. It may be that the children are perfectly safe. However, without a proper investigation I cannot know that. One must always be cautious in interim proceedings about unintended consequences. It is for good reason that the authorities direct judges to act with caution.

[57] It may well be that the father is ultimately vindicated at the final hearing. If that is the case, then the orders that I make have for a period of time denied the children a relationship with their father. However, I cannot ignore the allegations of risk that are raised on the mother's material.

[58] In determining what is in the best interests of the children, I will now turn to the additional considerations so far as they are relevant.

[59] The children are at an age where their views are not a relevant consideration.

[60] I accept that the children have a close relationship with their mother and the evidence of the Family Report writer would suggest that the children have a close relationship with their father. It is concerning that the children are not currently spending any time with their father, particularly in light of X's autism spectrum disorder and the necessary disruption to his relationship with his father that has been occasioned by the suspension of all time.

[61] A considerable focus for the purpose of interim proceedings is a consideration of the factors identified in s 60CC(3)(f) and (i) calling into focus the insight and capacity of the parents to place the children's needs above their own, the attitude to the parents and the responsibility of parenthood. The Family Report and the history subsequent to it raises very serious and troubling concerns about the insight of both parents and their capacity to place the interests of the children over and above their own interests and needs.

[62] In *Mulvany & Lane* (2009) FLC 93-404, the Full Court constituted by May and Thackray JJ stated as follows:

76. It is important to recognise that the miscellany of "considerations" contained in ss 60CC(2) and (3) is no more than a means to an end. Self evidently, they are only matters to be **considered**. Of course, we accept they are of great importance, being the factors identified by Parliament as those the Court must take into account (when they are relevant). However, they must be applied in a manner consistent with the overarching imperative of securing the outcome most likely to promote the child's best interests.

....

77. It needs also to be remembered that the importance of each s 60CC factor will vary from case to case. ...

(Emphasis in original)

**[63]** I am satisfied on the material before me that the primary consideration of the need to protect the children from a risk of harm is the most pressing and prevailing consideration and overwhelms any of the other matters that might otherwise be a relevant consideration within the terms of s 60CC(3).

**[64]** This is a case all about risk. There is an extremely poor co-parenting relationship, a high level of distrust and there are allegations of family violence. I am not, within the confines of this hearing, able to resolve the competing allegations.

**[65]** Consistent with the obligation to act cautiously for the above reasons, I decline at this stage to make the orders the father seeks for parenting orders. I propose to make orders that will discharge Orders 4 to 12 of the orders made on 7 December 2021.

**[66]** I am not satisfied at this stage that it is appropriate, or in the children's best interests, that there be made an order for sole parental responsibility in favour of their mother. I have reservations about her responsibility as a parent and her historical attitude to the responsibilities of parenthood. The mother sought an order that the father spend no time with the children or alternatively, that time be supervised on one occasion a week for a maximum of two hours at the V Contact Centre. The mother also proposed an order that the father have telephone contact with the children each Monday and Thursday for a period not exceeding 20 minutes with the father to initiate the call and for it to be supervised by the mother.

**[67]** I am troubled in circumstances where the children have not seen their father since October that an arrangement where time is to be spent at a contact centre would further delay the resumption of the children's relationship with their father. The mother's counsel conceded that there would be a delay in resuming time through a contact centre and could not advise when such time would commence. It is incumbent on parties who come to Court seeking such an order to provide some evidence as to the efficacy of the proposal.

**[68]** I am satisfied that notwithstanding the risk identified that it can be managed through supervision.

**[69]** The father indicated that he was prepared to meet the costs of supervision including that of a professional supervisor. I note that the parties have in the past used a professional supervisor. I am of the view that time with the father should occur on a supervised basis and that supervision can be provided by a professional contact service with the father to meet the costs of that contact service.

**[70]** I do not understand why it is that the father's time with the children should be limited to two hours, particularly in circumstances where under the existing orders he was spending significantly greater lengths of time.

**[71]** Accordingly, I propose to make orders that the father spend time with the children each alternate Saturday for a period of up to six hours to be supervised by a professional contact service with the father to meet the costs of supervision. The father is also to meet the costs of the preparation of any report by the supervisor.

....

[72] The mother was not opposed to the children's paternal grandparents being able to attend once a month so I will make such an order. I will also make an order in terms of that sought by the mother for telephone time.

[73] I am of the view that orders of the type contemplated are at this stage orders that are in the best interests of the children.

## Order

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1. Orders 4 through to 12 of the Orders made 7 December 2021 are discharged.
2. The respondent father ("the father") shall spend time with the children X born 2016 and Y born 2017 each alternate Saturday for a period up to six hours to be supervised by a professional contact service agreed upon between the parties.
3. The father is to meet the costs of supervision including the preparation of a report following each supervised visit.
4. The father's parents are permitted to attend on every second occasion of time that the children see their father.
5. The father is at liberty to telephone the children at 5.00 pm each Monday and Thursday evening for a period which does not exceed 20 minutes, with the father to initiate the call provided such call is supervised by the applicant mother.

The respondent appeared in person.

Counsel for the applicant: *Ms Clifton*

Solicitor for the applicant: *Ramsden Lawyers*

Solicitor for the independent children's lawyer: *G & D Lawyers*

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